Supreme Court, U. S.
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Nos. 1218 and 1219

In the Supreme Court of the United States

OCTOBER TERM, 1945

ROBERT LIEBERMAN, PETITIONER

v.

THE UNITED STATES OF AMERICA

IRVING MALBIN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the circuit court of appeals (No. 1218, R. 30–32; No. 1219, R. 34–36) is not yet reported.

JURISDICTION

The judgments of the circuit court of appeals were entered April 10, 1946 (No. 1218, R. 32–33;

No. 1219, R. 36–37). The petitions for writs of certiorari were filed May 10, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

QUESTIONS PRESENTED

1. Whether a direction for prosecution by the Attorney General upon a certification of the pertinent facts by the Price Administrator is a condition precedent to the institution of a criminal prosecution for violation of the Emergency Price Control Act.

2. Whether, in such a criminal prosecution, the defendant is entitled to challenge the validity of a price regulation he is charged with having violated.

STATUTE INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, are set forth in the Appendix, *infra*, pp. 7. 9-12

STATEMENT

On August 31, 1944, separate informations were filed against petitioners in the District Court for the Eastern District of New York charging them with wilfully making sales of meat at wholesale at prices in excess of those permitted by Revised Maximum Price Regulation No. 169, issued on

December 10, 1942, by the Office of Price Administration (7 F. R. 10381–10389), in violation of the Emergency Price Control Act of 1942 (No. 1218, R. 5–7; No. 1219, R. 7–19). Petitioner Lieberman pleaded guilty to counts 2 and 3 of the information against him (No. 1218, R. 3), and on June 5, 1945, he was sentenced on count 2 to imprisonment for sixty days and fined $2,500, and on count 3 to imprisonment for 6 months. Execution of the sentence on count 3 was suspended, and he was placed on probation for a period of 18 months. (No. 1218, R. 21–22.) Petitioner Malbin pleaded guilty to counts 1 to 16, inclusive, of the information against him (No. 1219, R. 5), and on July 12, 1945, he was sentenced to imprisonment for 3 months on each count, the sentences to run concurrently, and on count 1 he was fined $1,000 (No. 1219, R. 27–28).

Prior to the imposition of sentence upon him, petitioner Lieberman filed a motion in arrest of judgment on the grounds, *inter alia*, that Revised Maximum Price Regulation No. 169 never became effective because it was issued by the Office of Price Administration without the approval of the Secretary of Agriculture, as required by Section 3 (e) of the Act (*infra*, p. 4); that the regulation had been rescinded by Directive No. 28 issued on or about January 10, 1945, by the Director of the Office of Economic Stabilization, and by Maximum Price Regulation No.

574 issued by the Office of Price Administration (*infra*, p. 4); and that the information had been filed without the prior approval of the Attorney General upon certification of the facts to him by the Price Administrator (No. 1218, R. 9–12). This motion was denied by the district court (No. 1218, R. 19). Lieberman's oral motion to vacate the sentence on the same grounds was also denied (R. 1218, R. 20). Petitioner Malbin also moved, prior to the imposition of sentence, in arrest of judgment on the ground that "at the time of the alleged crime the regulations had in effect been set aside"; the motion was denied (No. 1219, R. 20–23).

On appeal to the Circuit Court of Appeals for the Second Circuit, each petitioner's conviction was affirmed in a single opinion (No. 1218, R. 30–33; No. 1219, R. 34–37).

ARGUMENT

1. Petitioners contend (No. 1218, Pet. 8; No. 1219, Pet. 6) that the prosecutions must fail because there was no showing that the Price Administrator had certified the pertinent facts to the Attorney General and that the latter had thereupon directed the filing of the informations; they assert that under Section 205 (b) of the Emergency Price Control Act (*infra*, p. 4), such directions were conditions precedent to the institution of the prosecutions. This contention is plainly without merit.

Section 205 (b), the penal section of the Act, provides that "Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought." The court below held, and we think its holding was clearly correct, that this provision "certainly does not change the normal method of instituting criminal proceedings in the United States courts or require special allegations in the information" (No. 1218, R. 32). As the court said in *United States* v. *Ganz*, 48 F. Supp. 323, 327 (D. Mass.), the first sentence of section 205 (b) provides the criminal sanctions for violations of the Act, and the sentence in question merely grants to the Administrator discretionary authority to certify the facts to the Attorney General; its purpose was to make clear that the Administrator could not himself initiate criminal prosecutions. See also *United States* v. *Harris*, 54 F. Supp. 563, 564 (W. D. Pa); *United States* v. *Friedman*, 50 F. Supp. 584, 585 (D. Conn.).

2. Petitioners also contend that Revised Maximum Price Regulation No. 169 is invalid because it was issued by the Price Administrator without the approval of the Secretary of Agriculture, which, they claim, was required by Section 3 (e) of the Act (*infra*, p. 7) (No. 1218, Pet. 9–10; No. 1219, Pet. 7–8); and, further, that the regu-

lation was retroactively rescinded on January 29, 1945, a date subsequent to the violations alleged in the information (No. 1218, Pet. 8–9; No. 1219, Pet. 10–11). It is plain, we submit, as the court below held (No. 1218, R. 31), that these contentions are not open to petitioners in these criminal prosecutions, even under the decision in *Yakus* v. *United States,* 321 U. S. 414, for they do not go to the constitutional validity of the regulation on its face. Cf. *Case* v. *Bowles,* No. 261, this Term, decided February 4, 1946, slip opinion, p. 3. See also *Rosensweig* v. *United States,* 144 F. 2d 30, 32–33 (C. C. A. 9), certiorari denied, 323 U. S. 764, No. 442, O. T. 1944, and *Shrier* v. *United States,* 149 F. 2d 606, 608 (C. C. A. 6), certiorari denied October 8, 1945, No. 162, this Term, and our briefs in opposition in those cases. Furthermore, by the amendment of June 30, 1944, of the Emergency Price Control Act, Congress added Section 204 (e) (*infra,* p. —), which provides, *inter alia,* that, upon application by the defendant in a criminal prosecution within five days after judgment of conviction, the criminal court shall grant leave to the defendant to object to the validity of the regulation in the Emergency Court of Appeals, if it finds that the objection is made in good faith and there is a reasonable excuse for the defendant's failure to have objected to the regulation before the Price Administrator; and that, if the Emergency Court of Appeals thereafter sustains the defendant's objection, the criminal

proceeding shall be dismissed. This amendment made it clear, as the court below pointed out (No. 1218, R. 31), that all attacks upon the validity of price regulations are committed in the first instance to the exclusive jurisdiction of the Emergency Court of Appeals. See also *Old Monastery Co. v. United States,* 147 F. 2d 905, 906 (C. C. A. 4), certiorari denied October 8, 1945, No. 229, this Term, and our brief in opposition in the *Shrier* case, *supra,* pp. 6–7.

In any event, it is evident that the statutory requirement of approval by the Secretary of Agriculture was inapplicable in the case of Revised Maximum Price Regulation No. 169, for that regulation established maximum prices for beef and veal carcasses and wholesale cuts. Such commodities are products processed from agricultural commodities as to which the prior approval of the Secretary of Agriculture was not required. *United States* v. *Charney,* 50 F. Supp. 581, 583 (D. Mass.); and see our brief in opposition in the *Rosensweig* case, *supra,* pp. 7–11.

Nor is there any merit in the claim that Revised Maximum Price Regulation No. 169 was revoked by Directive No. 28, issued by the Director of the Office of Economic Stabilization on January 10, 1945 (10 F. R. 552), and by Maximum Price Regulation No. 574, issued by the Price Administrator on January 29, 1945 (10 F. R. 1270–1278). The directive ordered the Price Administrator to issue not later than January 29, 1945, a price

regulation "establishing overriding ceiling prices for the sale and delivery of cattle and calves * * * and maximum amounts which slaughterers may pay for cattle purchased during each monthly accounting period." Regulation No. 574, which was issued pursuant to the directive, established overriding ceiling prices for live bovine animals and maximum amounts which slaughterers might pay for cattle. It is clear that the directive and Regulation No. 574 did not revoke Regulation No. 169; the former apply in terms only to live cattle, whereas the latter applies to processed meat. Furthermore, as the court below held (No. 1218, R. 32) on the authority of *United States* v. *Hark,* 320 U. S. 531, 536, where a similar contention was urged, a repeal of the regulation would not bar prosecution for earlier violations.

CONCLUSION

The cases were correctly decided below. There are no questions of importance or conflict of decisions involved. It is respectfully submitted, therefore, that the petitions for writs of certiorari should be denied.

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JUNE 1946.